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No. 08-405

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CROSS COUNTRY BANK, INC.,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK, by ANDREW CUOMO, Attorney General of the State of New York,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

REPLY TO BRIEF IN OPPOSITION

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PRELIMINARY STATEMENT

The opposition of the Attorney General of the State of New York (the "Attorney General") to the Petition of Cross Country Bank ("CCB") underscores the importance of this Court's granting review of the New York Court of Appeals' decision eviscerating the total preemption set forth in Section 1610(e) of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1610(e). Contrary to the Attorney General's insistence, the Court of Appeals refused to follow two critical tenets of the Court's preemption jurisprudence. The Court of Appeals relied on a contrived distinction to evade this Court's holdings that preemption statutes using the phrase "relating to" are to be construed broadly. Similarly, the Court of Appeals insisted that the presumption against preemption should be employed to preserve the right of the Attorney General to impose additional disclosure requirements in direct contravention of Section 1610(e)'s express prohibition. The Attorney General fails to come forward with any principled justification for that decision.

Indeed, at the end of his opposition to this Petition, the Attorney General confesses to the relief that he really seeks. In response to the statute's express limitation restricting the right to apply State law, the Attorney General asserts that "both the text and purpose of the legislative and regulatory materials at issue . . . expressly exempt state deceptive practices laws from preemption, without any . . . limitation." *See* Attorney General's Brief at 25. This assertion tramples Section 1610(e)'s plain and unambiguous words, which are every use of state law is preempted "except that any State may employ or establish State laws for the purpose of enforcing the

requirements of [TILA]." The Court of Appeals erroneously upheld the Attorney General's obliteration of this limitation.

The Attorney General wrongly contends that the Court of Appeals' decision poses no threat to the national uniformity that Congress mandated when it amended TILA in 1988 and adopted Section 1610(e). Yet, the Court of Appeals has sanctioned the Attorney General's efforts to impose additional and different disclosures in credit card solicitations via the assertion of a claim for false and deceptive practices and to ignore the exclusive authority vested in the Federal Reserve Board. If not reversed, the Court of Appeals' ruling will invite every other State attorney general to use state law to impose state-specific disclosure requirements.

ARGUMENT

POINT I

THE COURT OF APPEALS REFUSED TO FOLLOW THIS COURT'S HOLDINGS

The New York Court of Appeals refused to abide by this Court's holding that, when Congress uses the phrase "relating to" in provisions such as Section 1610(e), it is "express[ing] a broad pre-emptive purpose." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992); *accord Rowe v. N.H. Motor Transport Ass'n*, 128 S. Ct. 989, 995 (2008); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983). The Attorney General responds that the Court of Appeals did follow those decisions, and that it instead concluded that the Attorney General's claims do not "relate" to disclosure obligations under TILA. *See* Attorney General's Brief at 20. This argument merely embraces the Court of Appeals' refusal to follow this Court's jurisprudence based on an immaterial and superficial factual distinction.

The Court of Appeals specifically concluded that *Morales* is not relevant because the preemption issue under TILA is too tenuous, remote or peripheral. App14a.[1] It claimed that "the reach of § 1610(e) is not as expansive" as the statutory preemption provision at issue in *Morales*. App15a. The Attorney General adopted this erroneous conclusion. *See* Attorney General's Brief at 14. In fact, the two preemption provisions are fundamentally identical.

In *Morales*, the National Association of Attorneys General issued guidelines concerning airline adver-

[1] "App" refers to the Appendix annexed to CCB's Petition.

tising, frequent flier programs and compensation policies for passengers yielding their seats on overbooked flights. A group of attorneys general, including the Attorney General of New York, threatened to use their deceptive practices statutes, such as Section 349 of the New York General Business Law (the "GBL"), to enforce their guidelines concerning airline advertising. *Morales*, 504 U.S. at 379-80. This Court held that the use of such statutes was preempted by the Airline Deregulation Act, which preempts any state law "relating to rates, routes, or services of any carrier . . . ." *Id.* at 383-84 (citation omitted). Just as the State's regulation of information provided in airline advertising relates to "rates, routes or services," the State's regulation of information provided in credit card solicitations, such as credit limits, likewise relates to "the disclosure of information" in credit card solicitations. *Id.*

Despite the fact that it was construing an express preemption provision, the Court of Appeals further erred by employing the presumption against preemption to distort Section 1610(e)'s meaning. *See* Petition at 25. The Attorney General wrongly contends that "the Court of Appeals did not actually rely on the presumption [against preemption] to decide this case." *See* Attorney General's Brief at 20.

To the contrary, the Court of Appeals specifically stated that its interpretation of Section 1610(e) was "guided by the 'starting presumption that Congress does not intend to supplant state law' unless its intent to do so is 'clear and manifest'." App8a-9a (citation omitted). Further, the court mischaracterized the order enjoining CCB's disclosure practices as having only "'indirect economic influence' upon [CCB's] solicitations practices," and proceeded

to hold that this impact "is not sufficient to overcome the presumption against preemption of state law." App16a.

The presumption against preemption has no role in this case. In an express preemption case, Congress' intent is beyond dispute, and a court may resort to the presumption only when there is more than one plausible reading of the statute's text. *See, e.g.*, *Altria Group, Inc. v. Good*, No. 07-562, 2008 WL 5204477 at *4 (U.S. Dec. 15, 2008);[2] *Reigel v. Medtronic, Inc.*, 128 S. Ct. 999, 1008-09 (2008) (no grounds for narrowing the scope of preemption because "the statute itself speaks clearly to the point at issue"); *id.* at 1014 (Ginsburg, J., dissenting); *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 256 (2004) ("[O]ur interpretive method . . . neither invokes the 'presumption against preemption' to determine the *scope* of pre-emption nor delves into legislative history. Application of those methods, on which not all Members of this Court agree, demonstrably makes no difference to resolution of the principal question . . . ." (citation omitted, emphasis in original)). The Court of Appeals did not identify any

[2] The Court of Appeals' decision is also inconsistent with this Court's recent ruling in *Altria*. The Atria Court employed the presumption against preemption only because the provision at issue in the statute was susceptible to more than one meaning. 2008 WL 5204477 at *4. The preemption provision in that statute differs markedly from Section 1610(e). It applied only to state law requirements "based on smoking and health." The Court specifically contrasted that provision to the type of provision such as Section 1610(e): "Unquestionably, the phrase 'relating to' has a broader scope than the Labeling Act's reference to rules 'based on smoking and health . . . .'" *Id.* at *8 (citations omitted). The Court applied that narrower scope when it held that the fraud claims were not preempted. *Id.* at *8.

ambiguity in the text, as it was required to do to invoke the presumption, and instead used the presumption as a pretext for disregarding Section 1610(e)'s plain meaning and the Congressional mandate of national uniformity.

POINT II

THE COURT OF APPEALS' HOLDING UNDERMINES CONGRESS' GOAL OF NATIONAL UNIFORMITY

The Attorney General argues that the Court of Appeals' ruling is not inconsistent with Congressional goals for uniform national disclosure requirements because (i) "this case could equally have been brought by the [Attorney General] under the FTC Act, which is not displaced by TILA," and (ii) Congress intended for the States to supplement TILA's disclosure requirements through the application of false and deceptive practice statutes such as Section 349 of the GBL. *See* Attorney General's Brief at 18, 21-22. The first argument is patently erroneous, and the second is inconsistent with both Section 1610(e) as well as any legitimate reading of its legislative history.

First, the States have no authority to enforce the FTC Act's prohibition of unfair and deceptive practices. *See* 15 U.S.C § 45(a)(2) (granting enforcement power to the FTC and, with respect to banks, to the federal banking agencies designated in 15 U.S.C. § 57a(f)(3)). Moreover, the sole authority cited by the Attorney General, *FTC v. Febre*, No. 94 C 3625, 1996 WL 396117 (N.D. Ill. July 3, 1996), *aff'd*, 128 F.3d 530 (7th Cir. 1997), did not involve an enforcement proceeding against credit card solicitation disclosures, but was a run of the mill FTC case

concerning the marketing of a get-rich scheme. *See* Attorney General's Brief at 22.

Second, the Attorney General's reliance on the statute's legislative history is improper. Section 1610(e) unambiguously prohibits any state action other than "for the purpose of enforcing the requirements of [Section 1632 and Section 1637(c), (d), (e) and (f) of TILA]." The Attorney General may not subvert the statute's plain meaning by resorting to legislative history. *See Whitfield v. U.S.*, 543 U.S. 209, 215-17 (2005); *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 462 n.11 (1993).

Further, the complete legislative history demonstrates that the Attorney General's use of it is wrong. Congress balanced the competing interests of consumers and banks, and national uniform regulation of credit card solicitations was the result. *See* Petition at 36 (quoting remarks of Representative Schumer, 134 Cong. Rec. H10179-02, 1988 WL 181188 (Oct. 13, 1988)). The legislative history makes clear that Congress amended TILA in order to establish national uniformity and to eliminate all state regulatory authority. For example, Representative St. Germain explained in the House debate: "Some of us, frankly, had hoped that we could avoid a flat preemption of State laws and allow the so-called truth-in-lending approach to apply—an approach which would allow States to enact credit card disclosure laws so long as they were not inconsistent with the Federal Law. Ultimately, however, we settled on a compromise which added ancillary fees which brought the provisions of this legislation to the outer limits of the strongest laws now on the books in any State. We also gave the Federal Reserve

Board the authority to add disclosures in the future." 134 Cong. Rec. H10179-02, 1988 WL 181188 (Oct. 13, 1988).

The Attorney General misuses the legislative history to distort Congress' intent. He points to the statement in the Senate Banking Committee Report that the preemption provision does not "apply to the use of State mini-Federal Trade Commission statutes to address unfair or deceptive acts or practices." *See* Attorney General's Brief at 3 (quoting S. Rep. No. 100-259, at 9 (1987), *reprinted in* 1988 U.S.C.A.A.N. 3936, 3945). The Attorney General incorrectly asserts that this passage gives the States the absolute right to use such statutes for any purpose. *See* Attorney General's Brief at 21-23.

This Court has consistently held that, if the legislative history is inconsistent with the plain meaning of the statute, the plain meaning of the statute prevails. *See BedRoc Ltd., LLC v. U.S.*, 541 U.S. 176, 183, 186-87 (2004); *Norfolk & W. Ry. Co. v. Am. Train Dispatchers' Ass'n*, 499 U.S. 117, 128 (1991). Section 1610(e) expressly states that the use of State statutes is limited solely to enforcement of TILA's requirements.[3]

The Attorney General's reliance on the administrative materials is likewise misplaced. *See* Attorney General's Brief at 5-6. Those materials merely state the non-controversial proposition that the use of "state laws prohibiting deceptive acts or practices" is not barred. *See* 12 C.F.R. pt. 226, Supp. I, ¶ 28(d)(3); Truth in Lending: Credit and Charge Card Disclosures (Final Rule), 54 Fed. Reg. 13,855, 13,864

[3] For the same reason, the Attorney General's purported reading of the House Conference Report, see Attorney General's Brief at 4, is erroneous.

(Apr. 6, 1989). That proposition proves nothing. The States are not absolutely barred from using such statutes—they are barred only from using them to impose additional disclosure obligations.

POINT III

THE COURT OF APPEALS MISCONSTRUED THE SCOPE OF SECTION 1610(e)

The Court of Appeals effectively eviscerated the express preemption set forth in Section 1610(e) when it held that the statute's preemptive effect is limited to State action that is inconsistent with the specific disclosure requirements actually adopted by the Federal Reserve Board under Regulation Z—a classic "conflict" type of preemption. *See* Petition at 29-33. That holding renders Section 1610(e) a nullity because TILA already had a conflict provision in Section 1610(a) that, regardless of Section 1610(e), preempts inconsistent state law requirements. *See id.* at 26-28.

As Judge Read observed in her dissent, the majority restricts Section 1610(e) to bar only state action that would be inconsistent with actual disclosure requirements established by the Federal Reserve Board. *See* App29a-31a, 39a-40a. The majority insisted that there was no conflict because CCB's disclosure of credit limits and initially available credit "do not constitute the disclosure of any information 'which is subject to the requirements of [*sic*] 1637(c).'" *See* App11a (quoting 15 U.S.C. § 1610(e)). The majority concluded:

> Section 1610(e) preempts only those state laws that relate to the format, content, manner, or substance of the *TILA-required dis-*

> *closures*. Thus, there is no preemption here because neither [the Attorney General's] claims nor the relief it was granted have any effect upon *those disclosures*.

App15a (emphasis added).[4] The Court of Appeals reasoned that the relief sought by the Attorney General did not impose any disclosure obligations. The Attorney General echoes that assertion and contends that all he sought to do here was to prohibit deceptive practices. *See* Attorney General's Brief at 23-25.

The Attorney General's argument is a quintessential example of elevating form over substance. The Attorney General's distinction between disclosure requirements and the prohibition against false and deceptive statements is both specious and contrary to the principles of broad preemption.

Section 1610(e) bars the States from imposing any disclosure obligation, regardless of how it seeks to achieve such a result. In other words, Section 1610(e) prohibits both direct and indirect attempts to regulate disclosures.

There is no doubt that the Attorney General sought to impose disclosure requirements and that he succeeded in persuading the New York courts to do so. That fact is made plain by the intermediate appellate ruling that the Court of Appeals affirmed. The Appellate Division held, among other things:

[4] The Court of Appeals concluded that, prior to the Federal Reserve Board proposal in 2007 to require disclosures about credit limits, there was a void that the States were entitled to fill until the Federal Reserve Board affirmatively acted. See App14a-15a, App21a-22a n.14.

> [W]e agree that the violations were established as a matter of law. The offers had a prominent display informing consumers they had been "pre-approved" for a credit limit up to $1,000 or $2,500. *They did not state that most consumers who received these solicitations do not receive even half the amount listed.* While minimum credit limits were detailed in the solicitations, *no disclosures revealed how likely a consumer was to receive amounts above the minimum.* Scripts used by telemarketers to solicit consumers did not clarify this information or reveal credit limits usually granted. In response to the representation by CCB's vice president, Paul Seitz, that these problems had been corrected since June 2001, our review of the new disclosures found the correction to be embedded on the second page of the "Terms and Conditions of Offer," *in the same typeface as the rest of the paragraph.* Recognizing that Respondent submitted the affidavit of Donald Whittaker, a private consultant who reviewed the terms of the solicitation from December 2001, categorizing the disclosure as "unsurpassed in the industry," we find Supreme Court to have correctly determined that neither of these proffers addressed the obvious problems associated with the initial solicitations.

App55a-56a (emphasis added).

As this illustration demonstrates, the relief obtained by the Attorney General necessarily imposes disclosure requirements. The Attorney Gen-

eral wrongly insists that there is no disclosure requirement because CCB has the option of saying nothing at all. *See* Attorney General's Brief at 24. That argument cannot withstand scrutiny. The trial court directed that, when CCB disclosed the range of credit limits, CCB also had to disclose the amount of the credit likely to be received in the same prominent manner. The fact that this disclosure obligation is conditional does not change its nature. Any disclosure requirement, be it mandatory or conditional, trespasses on the exclusive authority granted to the Federal Reserve Board to establish national uniform requirements.

Further, as this Court has recognized, preemption equally applies when the federal regulator chooses to be silent and not to impose additional obligations. The decision to do nothing is entitled to the same preemptive effect as a decision to impose a requirement. In *Morales*, this Court rejected the contention that State action is preempted only if it affirmatively requires a different or additional affirmative disclosure. 504 U.S. at 385 ("Petitioner contends that [the ADA] only pre-empts the States from actually prescribing rates, routes, or services. This simply reads the words 'relating to' out of the statute."); *see U.S. v. Locke*, 529 U.S. 89, 111-12, 115 (2000); *Ark. Elec. Coop. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 385 (1983). Thus, the States are not free to impose disclosure requirements unless and until the Federal Reserve Board adopts new disclosure obligations regarding credit limits such as those that it proposed in 2007. *See* App49a.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

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